Seattle-First National Bank and First Bank Independent Employees' Association. Case 19-CA-11385

30 April 1984

DECISION AND ORDER

By Chairman Dotson and Members Zimmerman and Hunter

On 3 March 1980 Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions, a brief in support, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

On 2 April 1979² employee Lynda Garman in a conversation with her supervisor requested a leave of absence to begin 13 April, during which she intended to serve as secretary-treasurer of Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO (Local 1182), then the certified representative of the Respondent's employees.³ On 4 April Garman's request for said leave was denied.

The complaint alleges that Garman's request for leave was "pursuant to" the terms of the then recently expired 1974-77 collective-bargaining agreement between the Respondent and the Union, and that the Respondent in denying the request violated Section 8(a)(1) and (5) of the Act.

The judge found that the Union "fail[ed] to perform the conditions precedent to the granting of the leave." We agree. He also concluded, however, that said failure to perform could not be deemed

material, and that the evidence "strongly suggests" that a proper written request would also have been rejected, apparently premised on the Respondent's having indicated an intent to test the Board's then outstanding Orders in the U.S. court of appeals. Applying, inter alia, a principle of "excuse by repudiation," he concluded that the Respondent violated Section 8(a)(5) and (1) in not granting Garman the leave she requested. We disagree, and find the judge's speculation unwarranted in light of the record. As set forth below we conclude that, irrespective of the status of the then outstanding Board Orders, and assuming arguendo the Respondent's bargaining obligation, as well as the surviving applicability of the expired 1974-1977 bargaining agreement clauses, no violation has been shown in this proceeding.

We note initially that the Respondent's answer to the complaint clearly asserted the wording of the 1974-1977 collective-bargaining agreement as a defense. While conceding its contest of the Board's decisions, the Respondent contended that, even if those decisions were sustained by the court of appeals, they had no application to the complaint in the instant proceeding. At the hearing, counsel for the Respondent reiterated that the Respondent was not questioning the affiliation issue in this proceeding.

As noted above, it is clear that there was a failure to fulfill the conditions precedent for a leave even under the expired agreement. Thus, the Union did not submit Garman's name in writing as one of its representatives, there was no timely written request by the Association for Garman's leave of absence, and Garman's oral request for leave did not coincide with her term of office. Both Garman and Association President Ard were presumably aware of the contract provisions, inasmuch as both had signed the 1974–1977 agreement as representatives of the Association.

It is also clear that compliance with those provisions had been the parties' accepted practice. Thus, the record indicates that all requests for such leaves of absence during the preceding 5 years had been made in writing in accord with the abovenoted provisions, with the possible exception of one request for a temporary leave for employee Keene in 1975, as to which there is a conflict in the record. In any event, the subsequent request for

¹ We note our Supplemental Decision and Order in Seattle-First National Bank, 265 NLRB 426 (1982), vacating our decision at 241 NLRB 751 (1979), amending the Union's certification. We have amended the caption to reflect the name of the Union in accordance with that Supplemental Decision and Order.

² All dates hereafter are 1979 unless designated otherwise.

³ See fn. 1., supra.

⁴ Art. IV, sec. B, of the 1974-1977 agreement provided in pertinent part: "The [Union] shall submit in writing to the Bank the names of its representatives and such changes of representatives as may occur.

The Bank shall only recognize such representatives when notified in advance by the Association."

Sec. C of that article provided: "Upon written request of the Association, leaves of absence will be granted to two Association representatives to devote full time to Association affairs. Such leaves of absence shall be for the term of office involved. Similar leaves of absence may be granted at the Bank's discretion upon written request of the Association for other Association members."

⁵ The judge rejected the Respondent's position that a subsequent written request in November 1979 was untimely. We disagree. The letter from Union President Ard was dated Friday, 16 November 1979—3 days before the scheduled hearing of 19 November. Additionally, that request postdated Garman's quitting her employment by some 7 months.

⁶ The judge implicitly recognized this inconsistency since he ordered Garman placed on a leave of absence retroactive only to 1 May 1979 rather than 13 April, the day Garman quit.

leave for Keene to serve a full term of office was made in writing by Association President Ard. Contrary to the judge's conclusion that the Respondent would not have acceded to a proper written request in connection with a leave for Garman because it had repudiated the 1974-1977 agreement, we note the record shows that the Respondent continued to honor Ard's leave of absence status made per written request beyond the time when Garman's oral demand was denied. Indeed, the question of whether the Respondent would have acceded to a request meeting the conditions precedent was in our view forestalled by Garman herself when she quit her employment 13 April, before she would have been entitled to a leave in any event and in fact even prior to her election to office.8

For the reasons set forth above, we conclude, contrary to the judge, that the Respondent did not violate the Act in denying Garman's oral demand for a leave of absence beginning 13 April 1979.9 Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

MEMBER ZIMMERMAN, concurring.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) when on 4 April 1979 it denied employee Lynda Garman's request for a leave of absence to serve as secretary-treasurer of Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO. Garman's request was made pursuant to the terms of the 1974-1977 collective-bargaining agreement, which in essence provided for leaves of absence on written request of the Union for at least two of its representatives, who were employees of the Respondent, to devote full time to union affairs. The complaint allegations were premised on the assumption that, on 1 November 1977, the Respondent had unlawfully implemented changes to that agreement, including a revised leave policy which did not provide for leaves of absence for employees to conduct union affairs. The Board found the changes to be unlawful in Seattle-First National Bank, 241 NLRB 753 (1979). However, on remand from the Ninth Circuit, the Board reconsidered that decision and concluded that the Respondent had lawfully implemented the November 1977 changes after reaching an impasse in bargaining with the Union. Consequently, since the changes were lawful, there is no basis for finding a violation in the denial of a leave of absence for Garman unless the Respondent failed to adhere to the revised leave policy established by those changes.

As found by the judge, the revised leave policy only provides for leaves of absence for medical, maternity, military service, educational, election to public office, or personal reasons. Personal leave is explained as follows:

Eligible staff members' requests for leave of absence for "personal" reasons will be considered on an individual basis and at the Bank's discretion.

There is no contention that the Respondent's action in denying Garman's request for leave violated this revised policy.

Accordingly, I concur in my colleagues' determination that the complaint be dismissed.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. This matter was tried before me in Seattle, Washington, on December 13, 1979. The charge was filed by Financial Institution Employees of America, Local No. 1182, chartered by United Food and Commercial Workers International Union, AFL-CIO, the Union, on May 8, 1979. The complaint, which was issued on August 8, 1979, alleges that Seattle-First National Bank, Respondent or the Bank, has violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq., the Act.

The complaint alleges that Respondent violated Section 8(a)(5) and (1) by refusing to grant employee Lynda Garman a leave of absence to serve as a full-time union official. Respondent admits refusing to grant the leave of absence to Garman but denies that it committed any unfair labor practices.

The parties were permitted during the hearing to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Posttrial briefs were filed for the General Counsel, for the Union, and for Respondent.

⁷ Ard's written request was for leaves of absence for both Keene and herself. The record does not show any notification to the Respondent of cancellation of the second leave of absence. Thus, Garman's request could be construed as a third leave of absence, which the Bank, under art. IV,C, could have granted or not granted at its discretion had there been a written request.

⁸ We do not agree with the judge's statement that Garman's departure was induced by the Respondent. To do so would also require us to conclude in essence that, having failed to comply with any of the contract provisions, Garman was entitled to quit and thereby obtain entitlement to more than she would if the appropriate conditions had been performed. This we are unwilling to do.

⁹ Additionally, subsequent to the issuance of the judge's decision herein, the Board has reversed its earlier decisions involving this Employer cited by the judge. See Seattle-First National Bank, 267 NLRB 897 (1983) and 265 NLRB 426 (1982).

^{1 638} F.2d 1221 (1981).

^{2 267} NLRB 897 (1983).

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a national banking association headquartered in Seattle and engaged in commercial banking at numerous locations within the State of Washington. During the past 12 months, a representative period, Respondent has provided services in excess of \$50,000 directly to customers outside the State of Washington.

The complaint alleges, the answers, admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1969 the Union, then called First Bank Independent Employees Association, has been the bargaining representative of Respondent's employees in the State of Washington. The most recent contract between Respondent and the Union was affective from August 1, 1974, through July 31, 1977. The negotiations for a succeeding contract were the subject of unfair labor practice charges in Seattle-First National Bank, 241 NLRB 753 (1979). In its April 5, 1979 Decision and Order, the Board found, inter alia, that Respondent violated Section 8(a)(5) and (1) by unilaterally implementing changes in the employment conditions of its employees on November 1, 1977. The Board ordered, inter alia, that Respondent take the following affirmative action:

- (a) Upon request, bargain collectively in good faith with the Union as the exclusive representative of the employees in the [appropriate unit] concerning rates of pay, wages, hours, and other terms and conditions of employment, and embody any understanding reached in a signed agreement.
- (b) Upon the Union's request, rescind any or all changes in terms and conditions of employment made on November 1, 1977, pursuant to its unilateral implementation of certain of its bargaining proposals, making payments as necessary to restore the status quo ante, plus interest.²

Also on April 5, 1979, the Board issued its Decision and Amendment of Certification in Seattle-First National Bank, 241 NLRB 751 (1979) [vacated by 265 NLRB 426 (1982)], in which it amended the certification to change the name of the certified bargaining representative from "First Bank Independent Employees Association" to "Financial Institution Employees of America, Local 1182, charatered by Retail Clerks International Union, AFL-CIO."

Respondent, seeking to obtain review of the Amendment to Certification refused to bargain and on September 28, 1979, the Board issued its Decision and Order in Seattle-First National Bank, 245 NLRB 700 (1979) [vacated by 265 NLRB 426 (1982)]. The Board Order required, inter alia, Respondent to cease and desist from refusing to bargain collectivley with the Union.³

At the time of the instant hearing, the matters reported at 241 NLRB 753 and 245 NLRB 700 were the subject of further proceedings in the United States Court of appeals for the Ninth Circuit.

The last collective-bargaining agreement between the parties contained, inter alia, the following provision at issue herein:

Upon written request of the Association leaves of absence will be granted to two Association Representative to devote full time to Association affairs. Such leaves of absence shall be for the term of the office involved. Similar leaves of absence may be granted at the Bank's discretion upon written request of the Association for other Association members.

The contract proposals put into effect by Respondent on November 1, 1977, did not contain such a provision. The Bank's present leave of absence policy provides for leaves of absence for medical, maternity, military service, educational, election to public office, or personnal reasons. Personal leave is explained as follows:

Eligible staff members' requests for leave of absence for "personal" reasons will be considered on an individual basis and at the Bank's discretion.

B. The Alleged Unilateral Change

Lynda Garman was employed by the Bank for approximately 7-1/2 years. On April 2, 1979, Garman, in a conversation with her Supervisor Jo Ann Travis requested a leave of absence to serve as secretary-treasurer of the Union. Travis said she would check into the matter and give Garman an answer at a later date. 4

Travis spoke with Fred Grinnel, the Bank's assistant vice president, and on April 4 informed Garman that she was not eligible for the leave. The reason given Garman

¹ The appropriate unit within the meaning of Sec. 9(b) of the Act is: All employees employed by Respondent in the State of Washington, excluding officers, management trainees, and professional employees, confidential employees, and supervisors and guards as defined in the Act.

² On April 11, 1979, the Union, by Nancy Holland, requested in writing that Respondent reinstate the status quo ante that existed on November 1, 1977. There is no evidence that the Bank ever responded to that request.

³ The Board granted a motion to amend the name of the Union to reflect the current name of the International Union, i.e., United Food and Commercial Workers International Union, AFL-CIO.

⁴ At the time of this conversation, Garman was the only nominee for the postion of secretary-treasurer. Thereafter, as Garman was running unopposed, she was appointed secretary-treasurer of the Union by then President Jerry Ard.

was that she had accepted employment with another employer.⁵

Garman quit her employment with the Bank on April 13, and began her employment with the Union on May 1, 1979. On November 16, 1979, Nancy Holland, who succeeded Ard as union president, wrote James Versoi, Respondent's vice president and manager of labor relations, requesting a leave of absence for Garman. Holland further requested the Bank's reasons for denying the requested leave. Holland's letter was never answered by the Bank.

C. Conclusions

The Respondent apparently disputes the validity of the Board's Order which requires it to restore the status quo ante of November 1, 1977. It further argues that assuming, arguendo, it must comply with the provisions of its 1974-1977 bargaining agreement with respect to leaves of absence, the Union never fulfilled the conditions precedent to the granting of such a leave. Respondent contends that the Union failed to submit in writing to the Bank the names of its representatives and such changes of representatives as they occurred and that the Union failed to request such a leave of absence in writing. Thus, Respondent argues that, as the Union did not comply with the requirements of the contract, the Bank is not obligated to grant Garman's requested leave.

While the Union did fail to perform the conditions precendent to the granting of the leave, it cannot be said that its failure to perform was material. Respondent was not injured to any extent and surely could have obtained performance had that been its objective. The evidence strongly suggests that a written request would also have been rejected.

Respondent has clearly indicated that it intends to test the Board's Orders requiring it to recognize and bargain with the Union. Further, Respondent has unilaterally changed the terms and conditions of employment of the unit employees and failed and refused to return to the status quo ante of November 1, 1977. Thus, Respondent had repudiated the agreement prior to Garman's request for leave. Finally, Garman was orally denied a leave on April 4 with seeming finality. Thus, under all of the circumstances a written request would appear to be futile.

Under principles of contract law, where the failure of a party to a contract to perform a condition is induced by a manifestation to him by the other party that he will not perform his own promise, the duty of such other party becomes independent of performance of the condition. See Restatement, Contracts § 306 (1932). The underlying reason for such a rule is simple: no one should be required to perform a useless act. Thus, if perform-

ance of a condition will be not followed by performance of the promise which is conditional, it is useless for the intended purpose and it is therefore unnecessary to perform the condition. Applying the principle of excuse by repudiation, I find the Union's failure to formally notify Respondent of Garman's election or to request the leave in writing to be excused. This conclusion is bolstered by Respondent's failure to respond to the Union's letter of November 16, 1979, requesting the leave and/or the reasons for the failure to grant the leave for Garman.⁸

Respondent further argues that the contract provision granting leaves of absence to union officials is unlawful under the Board's decision in *Dairylea*⁹ and, therefore, unenforceable. In *Dairylea* the Board held that supersenioirty contract provisions for union stewards which went beyond layoff and recall encourage union membership in violation of Section 8(a)(3) and Section 8(b)(2).

A leave of absence granted to a unit employee to devote full time to union affairs does not grant a special economic or on-the-job benefit to union officers. Rather, the granting of a leave of absence to devote full time to union affairs places election to union office on a par with public or military service in terms of an employee's ability to return to work. If there is any encouragement of union membership, it is minimal and is simply an incidental side effect of a more general benefit accorded unit employees. Thus, there is overriding benefit to all unit employees in that this provision encourages unit employees to run for union office to represent the unit's interests and the clause makes it easier for a unit employee to do so, as his or her job will be available after service with the Union. I therefore find a proper justification for the clause and do not find the provision to be unenforceable under Dairylea.

Finally, Respondent contends that the leave provision expired with the contract, analogizing it to union-security and checkoff clauses. While Respondent is correct the union-security and chekoff clauses do not survive the expiration of the contract, the reason for such rule is that union-security and checkoff clause are not permitted except under a contract which conforms to the proviso to Section 8(a)(3). Bethlehem Steel Co., 136 NLRB 1500 (1962), enfd. sub nom. Shipbuilders v. NLRB, 320 F.2d 615 (3d Cir. 1963). The instant clause, which, as found above, redounds to the benefit of all unit employees, with only incidental and minimal tendency to encourage union membership would appear to survive the contract.

⁸ Respondent's current leave of absence policy includes the following provision:

A leave of absence may not be granted for the purpose of accepting other employment except in the case of military duty or election to public office.

⁶ No testimony was offered that Respondent denied the leave because of the Union's failure to comply with the contractual provisions.

⁷ Buttressing this conclusion is the fact that employee Kathy Keene was granted a leave of absence to serve an unexpired term of office as treasurer pursuant to an oral request in the fall of 1975.

⁸ In its brief, Respondent argues that the written request of November 16 was untimely and, therefore, still a failure to perform. I reject that contention. I note that the contract did not specify any time for making the request. Further, it does not appear that the time of the request would be "of the essence" to this contract provision. Thus, the Union's delay would not be sufficiently material to permit the Respondent to repudiate the agreement.

Similarly, I find no merit in Respondent's contention that Garman had not rights under the Act since she voluntarily quit on April 13, 1979, prior to the time her leave would have been granted under the contract. As Respondent had manifested its intention to repudiate the contract, including the leave of absence provision, Garman's termination was induced by Respondent and cannot be relied on as an excuse for Respondent's failure to perform

ent's failure to perform.

⁹ Dairylea Cooperative, 219 NLRB 656 (1975), enfd. sub nom. NLRB v. Teamsters Local 338, 531 F.2d 1162 (2d Cir. 1976).

Thus, I find Respondent could not change such provision without prior bargaining in good faith with the Union.

CONCLUSIONS OF LAW

- 1. By unilaterally discontinuing leave of absences for employees in order to devote full time to union affairs, Respondent violated Section 8(a)(5) and (1) of the Act.
- 2. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practiaces within the meaning of Section 8(a)(5) and (1) of the Act, I would normally recommend that Respondent be ordered to cease and desist

therefrom, and, on request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit. However, there are now two outstanding Board Orders requiring Respondent to do so. I believe no purpose would be served by an additional Order requiring Respondent to take a course of conduct which was previously ordered by the Board and which is the subject of review by the court of appeals. See J. Ray McDermott & Co., 233 NLRB 946 (1977). I, therefore will recommend an Order which seeks solely to remedy the violation regarding the denial of a leave of absence to Lynda Garman. 10

[Recommended Order omitted from publication.]

¹⁰ Pursuant to the Charging Party's unopposed motion, the transcript has been corrected.